Commonwealth of Kentucky
Supreme Court of Kentucky
2015-SC-000256-D

Kentucky Occupational Safety and Health Review Commission — Appellant

v

On Appeal From Court Of Appeals
2013-CA-001501

Secretary of Labor
Commonwealth of Kentucky

and

Franklin Circuit Court
2012-CI-00962

Estill County Fiscal Court — Appellees

REPLY BRIEF OF APPELLANT KENTUCKY OCCUPATIONAL SAFETY AND HEALTH REVIEW COMMISSION

Respectfully submitted,

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Certificate of Service

I certify that a copy of this brief has been served via hand-delivery this 19th day of April, 2016 on Susan Stokley Clary, Clerk, Kentucky Supreme Court, State Capitol, Room 235, 700 Capitol Ave., Frankfort, Kentucky, 40601. I further certify that a copy of this reply brief was served upon the following counsel by first class US mail, postage pre-paid, on April 19, 2016: Samuel P. Givens, Jr., Clerk, Kentucky Court of Appeals, 360 Democrat Drive, Frankfort, Kentucky, 40601; Michael G. Swansburg, Jr., Office of General Counsel, Kentucky Labor Cabinet, 1047 US Highway 127 South, Suite 2, Frankfort, Kentucky 40601; D. Barry Stilz and Adrian M. Mendiondo, Kinkead & Stilz, 301 E. Main Street, Suite 800, Lexington, Kentucky, 40507; and Rodney G. Davis, Estill County Attorney, 200 Main Street, P. O. Box 150, Irvine, Kentucky 40336. I certify I did not withdraw the record on appeal.

Frederick G. Huggins

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Argument

I.

Introduction

In its brief to this court, appellee secretary of labor, the enforcing authority, has ignored the legal thread which leads ultimately to the conclusion Ms. Smith's complaint to her employer was a protected activity under the statute, KRS 338.121 (3) (a). The Kentucky secretary in his citation interpreted KRS 338.121 (3) (a) to provide protection to an employee who complained to her employer about safety and health. Then the hearing officer, after a trial, stated the secretary issued its discrimination citation under the authority of KRS 338.121 (3) (a). The recommended order stated the statutory rule: no person shall discriminate against any employee who has "filed any complaint." Hearing Officer Cobb said Ms. Smith's complaint to her employer was a protected activity.

Franklin circuit court stated the secretary must prove the employee engaged in a protected activity, in response to Estill County's argument Ms. Smith's complaint was not a protected activity according to the statute. In its opinion Franklin circuit cited to *Terminix International,*[1] *Inc v Secretary of Labor*, Ky App, 92 SW3d 743 (2002), a published court of appeals opinion.

Our court of appeals restated Estill County's argument that Ms. Smith's complaint was not a protected activity under the discrimination act. Then the court

[1] In *Kentucky Labor Cabinet v Graham*, Ky, 43 SW3d 247, 253 (2001), CCH OSHD 32,182, the supreme court said because our occupational safety and health law is patterned after the federal act, it "should be interpreted consistently with federal law." *Graham* was abrogated on other grounds by *Hoskins v Maricle*, Ky, 150 SW3d 1 (2004).

of appeals, in error, said the standards board bears sole responsibility to decide if employee to employer complaints are a protected activity, completely ignoring *Terminix, supra,* the language of the statute which protects an employee who "files any complaint" and Fair Labor Standards Act federal circuit cases which interpret the "files any complaint" language to encompass employee complaints to their employers.

In its opinion our court of appeals then sets the discrimination statute aside and discusses whether the Kentucky labor cabinet had an interpretative regulation for the discrimination statute, again ignoring *Terminix, supra*, and the "filed any complaint" language which a line of federal FLSA circuit court cases has held protects an employee filing a complaint with her employer.

Our court of appeals failed to conduct a *de novo* review of the law. Had the court of appeals taken this required step, it would have concluded that *Terminix* controlled the outcome of the Estill County case: the *Terminix* court held that an employee's mother's complaint was a protected activity, protected by the discrimination statute. The court of appeals for Estill County should have performed its duty to find the law.

Both appellees, Estill County and the Cabinet, have averred that our commission in its brief to this court has raised issues not raised below. This is not so. The overriding issue for this case is whether an employee complaint to her employer is a protected activity according to the statute, and to *Terminix*. The court of appeals ruled it is not, ignoring *Terminix*, the language of about filing any complaint and

the FLSA cases. The court of appeals mistakenly argues the secretary is incapable of making policy when issuing discrimination citations because he has no interpretative regulation. But the secretary does not need an interpretative regulation when the discrimination statute and supporting case law define Ms. Smith's complaint as a protected activity.

II.

Ms. Smith's Letter to the County Judge Executive Was a Protected Activity According to the Discrimination Statute, KRS 338.121 (3) (a).

Estill County argues the court of appeals was correct when it held Mary Smith's letter to the county judge was not a protected activity; Estill County could not be more mistaken. Analysis of this question centers around an interpretation of KRS 338.121 (3) (a), the occupational safety and health discrimination statute where it uses the phrase "filed any complaint." First of all the court of appeals in *Terminix, supra*, held that "Brenda Byers's phone call to OSHA on her son's behalf was a protected activity." Our *Terminix* court of appeals could not have reached that decision without reference to the discrimination statute and without reasoning first that had her son made the call instead, he was a patient in a hospital, his call would have been a protected activity.

Within the discrimination statute is the phrase "filed any complaint." If that phrase includes, as it does, employee complaints to their employer, then Ms. Smith's complaint to the county judge was a protected activity.

In our brief in chief, we discussed the fact that our OSH discrimination statute is an exact copy of the federal's. 29 USC 660 (c) (1). Both statutes employ the same phrase, "filed any complaint," as does the discrimination statute found in the Fair Labor Standards Act. See tab 6 of our brief in chief.

According to numerous federal circuit court opinions interpreting the FLSA language, "filed any complaint" includes complaints made by an employee to her employer.

In the leading case on this critical "filed any complaint" issue, the seventh circuit began with the rule that "'the language of the statute itself [and] [a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive. *Sapperstein v Hager*; 188 F3d, 852, 857 (7th Cir 1999)..." "[T]he plain language of the statute indicates that internal, intracompany complaints are protected. The retaliation provision states that it is 'unlawful for any person to discharge...any employee because such employee has filed *any complaint*.'" *Kasten v Saint-Gobain Performance Plastics Corp*,[2] 570 F3d 834, 837 - 838 (CA7 2009). See page 18 of the commission's brief in chief.

The court of appeals when it considered *Estill County* had a duty to find the law. Based on its own precedent, *Terminix, supra*, and the federal *Kasten* line of cases supporting *Terminix*, our court of appeals erred when it failed to find Ms. Smith's complaint to her employer was a protected activity.

III.

The Secretary States Our Commission

[2] Decided on other grounds on appeal to the US Supreme Court. 563 US 1, 131 SCt 1325 (2011).

Was Incorrect When It Argued a Citation, Issued with the Force of Law, Was Legally Superior to an Interpretive Regulation. We Will Show the Secretary Was in Error.

In *Estill County* our court of appeals focused almost exclusively on the lack of an interpretive regulation and lost sight of the discrimination statute and the citation which interpreted the statute. This is unfortunate because a federal interpretative regulation is only that, an interpretation. In *Perez v Mortgage Bankers Association, et al*, 575 US ___, 135 SCt 1199, 1919 LEd2d 186 (2015), the US Supreme Court stated "Interpretative rules 'do not have the force and effect of law and are not accorded that weight in the adjudicatory process.'" Citations, however, are an "administrative action" because citations are issued under the authority of a statute. In *Martin v Occupational Safety and Health Review Commission, et al*, 499 US 144, 156 – 157, 111 SCt 1171,1179, 113 LEd2d 117 (1991), the court stated an OSH citation "is agency action" and "when embodied in a citation, the Secretary's interpretation assumes a form expressly provided for by Congress." This means a citation, unlike an interpretative regulation, has the weight of law behind it. A citation is a superior vehicle for interpreting the Kentucky discrimination statute when compared with an interpretative regulation.

The same is true for Kentucky's General Assembly which wrote our discrimination statute. KRS 338.121 (3) (a). For *Estill County*, the issue ultimately is whether the discrimination statute where it uses the phrase "filed any complaint" protects employees who have complained about safety and health to their

employers. We have argued here, and in our brief in chief, that "filed any complaint" protected Ms. Smith when she complained to the Estill County judge executive.

Our Kentucky Supreme Court has held a court of law shall accord deference to an agency's interpretation of a statute it enforces:

> This Court has recognized the "deference afforded an administrative agency's construction of a statute that it is charged with implementing," so long as the 'agency interpretation is in the form of an adopted regulation or [a] formal adjudication.' *Board of Trustees of Judicial Form Retirement System v Attorney General of the Commonwealth*, 132 SW3d 770, 786 – 787 (Ky 2003), citing *Chevron USA, Inc v Natural Resources Defense Council, Inc*, 467 US 837, 844 -845...
>
> (emphasis added)
>
> *Louisville/Jefferson County Metro Government v TDC Group, LLC*, Ky, 283 SW3d 657, 661 (2009).

In Kentucky the secretary's issuance of a discrimination citation is his interpretation of the statute and its "filed any complaint" language, an interpretation to which Kentucky courts must defer. The same cannot be said of an interpretative regulation.

IV.

Our Hearing Officer's Recommended Order Was Not Arbitrary.

Estill County argues, in error, that the hearing officer's recommended order could not be "cured" by Franklin circuit court in its opinion because, in Estill County's words, and echoed by the court of appeals in its opinion, the hearing officer's determination was arbitrary. Estill County here has misapplied the word arbitrary. In *Bowling v Natural Resources and Environmental Protection Cabinet*,

Ky App, 891 SW2d 406, 409 (1994), the court of appeals defined the meaning of arbitrary in the context of an administrative decision:

> In determining whether an agency's action was arbitrary, the reviewing court should look at three factors...The court should first determine whether the agency acted within the constraints of its statutory powers or whether it exceeded them[3]...Second, the court should examine the agency's procedures to see if a party to be affected by an administrative order was afforded his procedural due process. The individual must have been given an opportunity to be heard. Finally, the reviewing court must determine whether the agency's action is supported by substantial evidence... If any of these three tests are failed, the reviewing court may find that the agency's actions was arbitrary.

Our hearing officer's recommended order was not arbitrary.

V.

There Are Special Reasons To Consider This Appeal.

CR 76.20 (1) states this court will grant review for special reasons.

This case does not want for special reasons to be called for review. In the first place, *Terminix, supra*, says an employee's mother's complaint to her son's employer is a protected activity under the OSH discrimination statute – this means, as we have pointed out above, the *Terminix* court found an employee's complaint to his employer was a protected activity according to KRS 338.121 (3) (a), the discrimination statute.

Our court of appeals for the *Estill County* case now before this court has made the opposite ruling: Ms. Smith's complaint to the Estill County judge executive was not a protected activity according to the court.

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[3] All our hearing officers do is hear and rule on appeals from citations. KRS 338.071 (4). That is what Hearing Officer Cobb did when he issued his recommended order.

Terminix, supra, is a published opinion. Our court of appeals for its *Estill County* opinion has designated it to be published. In *Estill County*, the court of appeals did not cite or distinguish *Terminix*. This conflict must be addressed.

A second reason for this court to take *Estill County* on review is the court of appeals' opinion itself. As we have demonstrated above, our hearing officer's recommended order was not arbitrary as the court of appeals had averred. See argument IV on page 6. Nevertheless, the court of appeals for *Estill County* focused on what it described as the hearing officer's arbitrary order, essentially ignoring the discrimination statute. For example, as we have discussed above for argument II, page 3, the three words "filed any complaint" in the discrimination statute have been interpreted to encompass employee complaints to their employers. *Kasten, supra*. The *Estill County* court of appeals essentially ignored its job to perform a *de novo* review of the law. *Estill County* presents an opportunity for this court to interpret the occupational safety and health discrimination statute and especially the meaning of "filed any complaint."

In Franklin circuit, the court equated arbitrariness with a decision not supported by substantial evidence; Franklin circuit found the hearing officer's findings of fact were supported by substantial evidence. Pages 4 and 6. Our court of appeals for *Estill County* had precious little to say about substantial evidence. Instead, the court of appeals wrote "rather than purge the smoke from the office, Estill County chose instead to purge Smith," and then "situations featuring sympathetic claimants such as Smith." Pages 3 and 16.

VI.

Estill County Is Not Protected By Sovereign Immunity.

Sovereign immunity in Kentucky may be waived by statute. In KRS 338.011 our General Assembly said:

> ...the General Assembly declares that it is the purpose and policy of the Commonwealth of Kentucky to promote the safety and health and general welfare of all its people by preventing any detriment to the safety and health of all employees, both public and private, covered by this chapter, arising out of exposure to harmful conditions and practices at places of work...
>
> (emphasis added)

Are there employees not covered by this chapter? Yes, there are. Federal employees are not covered by KRS chapter 338. Neither are employees covered where jurisdiction is exercised by the "Occupational Safety and Health Administration of the United States Department of Labor." KRS 338.021 (1) (a) and (b).

KRS 338.011 states employees, both public and private, are covered by chapter 338. The definitions section, KRS 338.015, defines employees: ""Employee' shall mean any person employed except those employees excluded in KRS 338.021." Our General Assembly, when it wrote the chapter, carefully excluded US government employees and those employees specifically regulated by the US Department of Labor. By its definition for employee and its statement of purpose and policy, KRS chapter 338 places public employees and their employers within the jurisdiction of the secretary, the enforcer of the act.

According to Estill County's logic, expressed in its brief, a waiver of sovereign immunity for KRS chapter 338 must be found in the discrimination statute, the enforcement statute (338.031), the inspection statute (338.101) and the penalty statute (338.991). KRS 338.021 and 338.015 (2) cover the entire chapter.

VII.

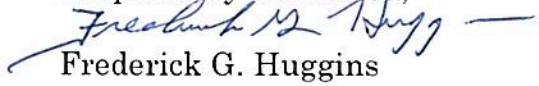
The Hearing Officer's Remedy Was Appropriate And Within the Law.

In KRS chapter 338.121 (3) (b) it says the review commission "may order all appropriate relief including rehiring and reinstatement of the employee to his or her former position with back pay." We note the statute says "all appropriate relief" which means reinstatement and back pay are not all the remedies in play.

Our hearing officer ordered Ms. Smith to be paid for the wages she has lost, "until Estill County reinstates her to the 911 Call Center call schedule as a part-time dispatcher..." She will receive pre-judgment and post-judgment interest. Her award will be reduced by any unemployment compensation she has received, a fair award.

Wherefore, appellant commission prays for an order from this court reversing the court of appeals and reinstating the opinion issued by Franklin circuit court.

Respectfully submitted,



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